

Supreme Court, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

NO.

78-430

EDGAR TODD, JR., and
ALICE TODD,

Petitioners

versus

ASSOCIATED CREDIT BUREAU SERVICES, INC.,
GENERAL CREDIT CONTROL, INC., and
HESS'S, INC.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
THIRD CIRCUIT

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INDEX

Table of Citations.....	11
Opinion Below.....	1
Jurisdiction.....	2
Questions Presented.....	2
Federal Provisions Involved.....	5
Statement of the Case.....	7
Argument.....	27
Conclusion.....	53

APPENDIXES

Appendix "A".....	54
Appendix "B".....	56

TABLE OF CITATIONS

	<u>Page</u>
<u>Austin v. Bankamerica Service Corp.</u> 419 F.Supp. 730 (N.D., Ga, 1974).....	43
<u>Bellshaw v. Credit Bureau of Prescott, et al</u> 392 F.Supp. 1356 (D.Org, 1975).....	31
<u>Beresh v. Retail Credit Company, Inc., et al</u> 358 F.Supp. 260 (C.D., Cal, 1973)	32, 35
<u>Greenway v. Information Dynamics, Inc.</u> 399 F.Supp. 1092, affirmed 524 F.2d 1145 (5th Cir, 1975) cert. denied 424 U.S. 969 (1975).....	33, 35
<u>Hansen v. Morgan, et al</u> 405 F.Supp. 1318 (D., Idaho, 1976)	33, 35
<u>Middlebrooks v. Retail Credit Company</u> 416 F.Supp. 1013 (N.D., Ga.1976).....	43
<u>Millstone v. O'Hanlon Reports, Inc.</u> 383 F.Supp. 269 (D.C., Mo.1974) affirmed 528 F.2d 829 (8th Cir, 1976)	43, 44

TABLE OF CITATIONS (Cont'd)

Peller v. Retail Corp., et al
359 F.Supp. 1235 (N.D., Ga,
1973) affirmed 505 F.2d 733
(5th Cir, 1974) 31, 43

Porter v. Talbot Perkins Children
Service
355 F.Supp. 174 (S.D., N.Y.1973)..... 31

Roseman v. Retail Credit
Company, Inc.
428 F.Supp. 643 (E.D., Pa.1977) 43

Wood v. Holiday Inns, Inc.
508 F.2d 167 (5th Cir, 1975)..... 39

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Respondents

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Edgar Todd, Jr., and
Alice Todd, pray that a writ of certiorari
issue to review the judgment of the United
States Court of Appeals, Third Circuit.

OPINIONS BELOW

The judgment and order of the United
States Court of Appeals, Third Circuit,
rendered June 6, 1978, is unsupported and
appears at Appendix "A", infra, Page 54 .

Judgment and Order of the United States District Court, Eastern District of Pennsylvania, rendered September 9, 1977, is reported ____ F Supp ____ (CED, Pa, 1977) and appears at Appendix "B", infra, Page 55 .

JURISDICTION

The final judgment of the United States Court of Appeals, Third Circuit, was rendered on June 6, 1978, and the Petition for Writ of Certiorari is timely filed within ninety (90) days herof. The jurisdiction of this Court rests upon 28 U.S.C. , and Rule 22 of this Court.

QUESTIONS PRESENTED

The question presented for consideration in the instant case is three-fold:

- 1) whether or not the Defendants are "consumer reporting agencies within meaning of the Fair Credit Reporting Act, 15 U.S.C. §1680 et seq; where the uncontradicted

evidence establishes that one of the defendants acts as a consumer reporting agent, the second, a department store, acts in a cooperative exchange of information with the consumer reporting agency, and the third acts as agent of the department store in the cooperative exchange of information; 2) whether or not the Defendants acted negligently and willfully in failing to follow reasonable procedures to assure maximum possible accuracy as required by 15 U.S.C. §1681 e(b) and 15 U.S.C. §1681(b) by reporting stale and misleading information concerning Plaintiffs by reporting to the business community a balance owed, when, in fact, the balance has been fully paid; and 3) whether or not consumer reporting agencies are mandated to advise consumers their right to request up-dates to all businesses who received disputed information where the information is incomplete and inaccurate.

Review by certiorari is appropriate in the case at bar under Rule 19 (1)(b) of the Rules of this Court for the following reasons: a) the Fair Credit Reporting Act, 15 U.S.C. §1680 et seq., presents an important pronouncement of Federal Law and has not been interpreted by this Court, and the issue should be settled by this Court; (b) there is a conflict in the decisions of the various circuits covering the definition of consumer reporting agencies, the statutory standard of "maximum possible accuracy", and the requirement of advising consumers of their right for an up-date to all businesses who received disputed information on the issues of i) completeness and ii) accuracy; and c) the decision of the lower courts is in direct contravention of the F.T.C.'s Compliance Pamphlet, 4 CCH, Consumer Credit Guide, which is statutorily mandated by the Fair Credit Reporting Act, 15 U.S.C. §1680

et seq., to guide businesses in complying with the Act.

FEDERAL PROVISIONS INVOLVED

Fair Credit Reporting Act, 15 U.S.C.

§1681 a(d):

"The term 'consumer report' means any written, oral or other communication of any information... bearing on a consumer's credit worthiness, credit standing, credit capacity...."

Fair Credit Reporting Act, 15 U.S.C.

§1681 a(f):

"The term 'consumer reporting agency' means any person [person = corporation, 15 U.S.C. §1681 a(b)] which...on a co-operative basis regularly engages...in part in the practice of assembling...consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

Fair Credit Reporting Act, 15 U.S.C.

§1681 (b):

"It is the purpose of this sub-

chapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of consumer credit...which is fair and equitable to the consumer with regards to the... accuracy....of such information."

Fair Credit Reporting Act, 15 U.S.C.

\$1681 e(b):

"Whenever a consumer reporting agency prepares a consumer report, it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."

Fair Credit Reporting Act, 15 U.S.C.

\$1681 i (a) and (d):

"(a) If the completeness or accuracy of any item of information in his file is disputed by a consumer... the consumer reporting agency shall... re-investigate and record the correct status of that information...

* * *

"(d) Following...any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted, or the statement codification or summary...[heretofore filed be given]...to any person..who has... within six months prior thereto

received a consumer report...
The consumer reporting agency shall clearly and conspicuously disclose to the consumer his right to make such a request."

Federal Trade Commission's Compliance Pamphlet, 4 CCH, Consumer Credit Guide, Paragraph 11, 30 6 (c) (2):

"Accuracy

The obligation to assure accuracy applies to all aspects of the handling of consumer information...
The requirement in law that steps be taken to promote accuracy also requires periodic re-evaluation of data to determine whether it has become obsolete or misleading with the passage of time."

STATEMENT OF THE CASE

a.) Procedural History of Case

Plaintiffs filed a Complaint against the Defendants under the Fair Credit Reporting Act, 15 U.S.C. §1680 et seq. Depositions were taken on July 8, 1976 and October 6, 1976. Plaintiffs and Defendants filed cross motions for summary judgment. On September 9, 1977, the United States

District Court, Eastern District of Pennsylvania filed an Order and Opinion granting Defendants' Motion For Summary Judgment and denying Plaintiffs' Motion For Partial Summary Judgment. On or about September 23, 1977, the Plaintiffs filed a timely appeal from said Order to the United States Court of Appeals, Third Circuit. On June 6, 1978, the United States Court of Appeals, Third Circuit, affirmed this judgment of the lower court on the Opinion and Order of the lower Court. Plaintiffs thereafter filed their timely Petition For Writ of Certiorari which is now before this Court for disposition.

b.) Facts of the Case

On July 26, 1971, Plaintiff, Alice Todd, applied for credit at Defendant, Hess's, Inc. (hereinafter, "Hess's"), by filling out a written credit application. (Deposition of Ruth M. Rohrbach [hereinafter "Rohrbach"], p. 8). In processing

Plaintiffs' credit application, Defendant, Hess's, obtained credit information on Plaintiffs from the Bethlehem Credit Bureau, Allentown Credit Bureau (predecessor in interest to the Defendant, Associated Credit Bureau Services, Inc., [hereinafter "Associated"], Rohrbach, p. 15) and directly from a finance company and Sears (Rohrbach, p. 10-12). Plaintiffs' credit application at Defendant, Hess's was approved on August 11, 1971, (Rohrbach, p. 16).

Defendant, Hess's, closed the Plaintiffs' account on July 31, 1972 at which time the balance owed was \$1,182.44 (Rohrbach, p. 20, Exhibit No. 1). The high balance owed Defendant, Hess's for the life of the account was reached in October, 1972, and was \$1,227.20 (Rohrbach, Exhibit No. 1).

Thereafter, Defendant, Hess's, pur-

sued collection of these funds by engaging Defendant, Associated's collection service in January, 1973. This service was provided the Defendant, Hess's, by the Defendant, Associated, in accordance with their contract which established a quid pro quo relationship between the two parties; to wit, Defendant, Hess's, supplies credit information to Defendant, Associated, from its own credit files, and in exchange, Defendant, Associated, supplies credit information to Defendant, Hess's, and further provides a letter service to Defendant, Hess's, to assist in collecting delinquent accounts. As part of this contract between Defendant, Hess's, and the Defendant, Associated, Associated Credit Bureau duly sent three (3) dun or collection letters to the Plaintiffs (Rohrbach, p. 22).

In August of 1973, the Plaintiffs

account was turned over to Defendant, General Credit Control, Inc. (hereinafter "General") for collection with the Defendant, General, acting as agent for the Defendant, Hess's, and Defendant, General, being aware that the Defendant, Associated, was advised that the account was delinquent.

As Defendant, General, received payments from the Plaintiffs, the monies, less commission, were forwarded to the Defendant, Hess's, to be applied to the account (Rohrbach, p. 29,32). The delinquent account was paid in full in the following payment schedules:

September, 1973	- \$ 50.00
November, 1973	- 150.00
January, 1974	- 150.00
March, 1974	- 100.00
May, 1974	- 75.00
July, 1974	- 50.00
September, 1974	- 652.00

(Rohrbach, Exhibit NO.1)

For purposes of the instant case, it is important to note that the account was

paid in full in September of 1974` (Rohrbach, Exhibit No. 1).

Notwithstanding that the Plaintiffs' account with the Defendant, Hess's, was paid in full in September of 1974, and as early as September, 1973, the balance had been steadily reduced from \$1,227.20, Defendant, Associated, continued to report the Hess's balance due at \$1,227.20 on Plaintiffs' credit report up to November, 1975. (Deposition of Ronald C. Smith [hereinafter "Smith"], p. 29).

Defendant, Associated, supplied this misleading erroneous and stale credit information to the following businesses:

December 17, 1974 - to Sears
Roebuck and Company

October 20, 1975 - to Merchants
National Bank of Allentown

October 27, 1975 - to Diana Shops

November 14, 1975 - to Kern's
Furniture

(Smith, p. 45; Deposition of

Randall Skeath, [hereinafter, "Skeath"], p. 134)

As a result of Defendant, Associated's, misleading, stale and erroneous credit reports, Plaintiffs were denied credit at a time of acute financial need at Merchants National Bank of Allentown for financing the purchase of a much needed new automobile and also at Sears, Roebuck and Company for the purchase of a microwave oven for a Christmas present (Deposition of Edgar C. Todd, Jr., [hereinafter "E. Todd"], p. 44-52; deposition of Alice Todd [hereinafter "A. Todd"], p. 82-84). These episodes were all the more tragic for Plaintiffs inasmuch as their young daughter suffered from a serious ailment which required open heart surgery in Philadelphia. The new automobile was needed to transport the girl to Philadelphia and to enable Plaintiffs to visit her regularly during the expected long convalescent period. The microwave oven was planned as a Christ-

mas gift from the sick daughter and the father of the Plaintiff, Alice Todd, as part of holiday preparations and celebration. At a time of heartbreak and worry, Plaintiffs' pain was aggravated by the erroneous credit reports which meant Plaintiffs could not get the new automobile and the sick daughter's hope for a Christmas present for her mother was darkened. (E. Todd, p. 44-52).

Plaintiffs belatedly learned of the unwarranted source of their credit difficulties after applying for credit at Kern's Furniture on November 13, 1975. The Todds received a call from Kern's informing them that Defendant, Associated's credit report reflected an unpaid balance at Defendant, Hess's. Mrs. Todd called Defendant, Associated, that, in fact, the Hess's account had been paid in full. Defendant, Associated, contacted Defendant, Hess's, and

then reported back to the Plaintiffs that the Defendant, Hess's, was uncooperative, and was not corroborating Plaintiffs' claim of full payment of the debt (A. Todd, p. 88; Skeath, p. 135). Eventually, Defendant, Associated, was able to correct the credit report upon learning that the facts were as reported by Plaintiffs (A. Todd, p. 88; Smith, p. 55; Skeath, p. 138).

At the interview between Defendant, Associated, and the Plaintiffs, Todds, the Associated Credit Bureau failed to notify the Todds as required by the Fair Credit Reporting Act that the Todds had the right to have the misleading, stale and erroneous information corrected, and that the Todd's had the right to require the Defendant, Associated, to give corrected information to people who inquired over the past six months, including Kern's. The only correction given by Defendant, Associated, was to

Kern's because the Plaintiffs specifically asked the Defendant, Associated, to contact Kern's since Kern's requested that Plaintiffs have Associated supply them with an up-dated corrected credit report. (A. Todd p. 96, 97; Skeath, p. 137,138).

Interestingly, the evidence suggests other negligence by the Defendant, Associated, in that Associated Credit Bureau's credit report on Plaintiffs contained other unexplained errors. It indicated that the last sale date from Defendant, Hess's to Plaintiffs was June, 1972, while at the same time indicating that the account was not opened with Hess's by the Todds until January of 1973. (Smith, p. 34,35). Also, the credit report indicated that the account was delinquent since April, 1969, at Thornton's Jewelers while at the same time indicating that the Thornton account was not opened until

November of 1970. (Smith, p. 59).

During the course of this litigation, Associated has repeatedly argued that the information it related was "accurate." (Paragraph 1 of Motion Of Associated For Summary Judgment.) Plaintiffs have always contested the claim of alleged accuracy as follows:

"The report on the Todds was not accurate. By virtue of the failure of Associated to advise merchants that the amounts turned over to collection and charged to profit and loss were subsequently paid, merchants receiving this partial information, consistent with Trade practice, interpreted such reports to mean the amounts were still unpaid when, in fact, the amounts were fully paid. Accordingly, Associated's claim of accuracy is untrue."

(Plaintiffs' Answer To Motion of Associated For Summary Judgment)

The factual basis for this assertion is found in the testimony of Randall Skeath, the credit manager of Kern's Furniture Store, who initially denied credit to the

Plaintiffs upon receiving the information from Associated:

Q. And, then department store open 1/73, and the last report of June, '74, \$1,227 balance past due, balance same, charged to profit and loss. And, what does that tell you?

A. That the department store charged off their account of \$1,227 to profit and loss.

Q. And, the balance was still owed them?

A. Right.

(Skeath, p. 134)

* * * *

Q. And, what was your conversation, would you tell us?

A. Well, I called the Todds, and Mrs. Todd answered. And, I told her that we could not deliver the furniture to them because we had received a bad credit report from the credit bureau.

(Skeath, p. 136)

A. ...and, I said we couldn't deliver it until the credit bureau gave us a report that it was -- that it (the department store) was paid.

(Skeath, p. 137)

A. ...They (Associated) notified us that the balance of the department store had been taken care of, which was our main concern...

(Skeath, p. 138)

A. ...(Associated) told us that the amount had been taken care of, that they had changed the credit report.

(Skeath, p. 139)

On this record, the lower court found as a fact and as a matter of law that the information, as furnished by Associated, was accurate:

"Because the report is not inaccurate, I must conclude, in accordance with Middlebrooks, that the Todds cannot sustain their cause of action."

(Opinion, p. 3)

* * * *

"Upon the finding that Associated reported accurate information, the Todds' secondary claim for relief under 15 U.S.C. §1681 i (d) must also fail... Once again, I must state that the Todds' consumer report contained no inaccurate information."

(Opinion, p. 4)

In understanding the relationship among

the three Defendants, it must be remembered that the Defendant, Associated, is a voluntary association of members of local businesses that supply consumer credit. The Defendant, Hess's, is a member of the association, and as such, a component part of Defendant, Associated. Defendant, Associated, is admittedly in the business of credit reporting. (Smith, p. 4). When Defendant, Associated, was established in 1928, Defendant, Hess's was the second business to join, but subsequently cancelled its membership in order to obtain more favorable membership rights. In 1970 or 1971, Defendant, Hess's, rejoined Defendant, Associated, as a member. (Smith, p. 36). One of the reasons Defendant, Hess's, left Defendant, Associated, was because of the inconvenience of the numerous requests Defendant, Associated, was making upon Defendant, Hess's, for credit information,

and Defendant, Hess's, did not feel that bilateral relationship of consumer credit exchange information was to its benefit. (Rohrbach, p. 51).

In 1973, Defendant, Associated, and Defendant, Hess's, renegotiated their contractual relationship, and the parties entered into a bilateral contract between the parties which provides for the reciprocal exchange of credit information. (Rohrbach, p. 38-40; Rohrbach, Exhibit No. 2). The contract provides for a dunning letter service, actually used by Defendant, Hess's, in attempting to collect the Plaintiff's delinquent account, and it further indicates that, after the Defendant, Associated, received an open account from the Defendant, Hess's, Defendant, Hess's would provide follow-up information:

"Follow-up information as to when payment in full of the past due balance has been received by Hess's will be

forwarded to the bureau
(Defendant, Associated), whenever possible."

(Rohrbach, Exhibit No.2)

In fact, even though Plaintiffs' delinquent account was paid in full by September of 1974, Defendant, Hess's failed to do so until this stale, misleading and erroneous information was reported to four local businesses with adverse consequences to Plaintiffs and until November of 1975 (fifteen months after full payment) when Plaintiffs made an issue of the accuracy of their credit report after learning for the first time from Kern's Furniture that Defendant, Associated, was still telling local businesses that Plaintiffs' account with the Defendant, Hess's was still delinquent. (Rohrbach, p. 48-52). This was consistent with Defendant, Hess's policy not to ever up-date consumer reports:

Q. Now, who in your department--
I take it it's your department,

these 60 or 70 girls that you have--would be responsible for notifying the credit bureau that payment in full of the past due balance had been received?

A. We have no one responsible to do that.

Q. You have no one assigned to do that?

A. Well, we don't do it.

Q. You don't do it?

A. No.

(Rohrbach, p. 45)

Furthermore, the evidence conclusively establishes that the Defendant, Associated never contacted Hess's to verify the accuracy of its credit reports or to up-date information on past-due accounts. (Smith, p. 75). The Defendant, Associated simply does not utilize any operating procedure whereby it up-dates information on any consumer reports on a periodic basis, (Smith, p. 68,69), and the Defendant, Hess's, for its part, made a policy decision that it would never up-date informa-

tion it supplied to the Defendant, Associated. The Plaintiffs became caught in the web of inaction decided by the Defendants, Associated and Hess's. Defendant, Hess's never gave Defendant, Associated up-dated information, and the Defendant, Associated was not going to take the initiative to obtain up-dated information from the Defendant, Hess's. This inaction on up-dating accounts is uncontested despite the fact that the evidence indicates the parties exchanged credit information almost daily, and that the Defendant, Associated contacted the Defendant, Hess's, by telephone at least six times per day on new accounts. The Defendant, Hess's admitted that given this informal arrangement, it was questionable whether accurate records were kept on this type of telephone communication. (Rohrbach, p. 52-56). In other words, despite the requirements of the Fair Credit

Reporting Act, the parties wholly neglected to provide any mechanism for up-dating credit reports when it was favorable to the consumer.

Defendant, General, as agent for the Defendant, Hess's, was aware of the relationship between Defendants, Hess's and Associated, and as agent for Hess's, never up-dated the information to Defendant, Associated when it obtained the monies from Plaintiffs. (Affidavit of Shatsky). The lower court, however, found no liable of Hess's or General in that the Court concluded that neither was a credit reporting agency within meaning of the action. (Opinion, 2). The United States Court of Appeals, Third Circuit affirmed on this Opinion and Order of the lower court.

STATEMENT OF QUESTIONS PRESENTED

- I. WHETHER OR NOT THE DEFENDANTS ARE "CONSUMER REPORTING AGENCIES" WITHIN MEANING OF THE FAIR CREDIT REPORTING ACT, 15 U.S.C. §1680 et seq., WHERE THE UNCONTRADICTED EVIDENCE ESTABLISHES THAT ONE OF THE DEFENDANTS ACTS AS A CONSUMER REPORTING AGENT, THE SECOND, A DEPARTMENT STORE, ACTS IN A COOPERATIVE EXCHANGE OF INFORMATION WITH THE CONSUMER REPORTING AGENCY, AND THE THIRD ACTS AS AGENT OF THE DEPARTMENT STORE IN THE COOPERATIVE EXCHANGE OF INFORMATION?
- II. WHETHER OR NOT THE DEFENDANTS ACTED NEGLIGENTLY AND WILLFULLY IN FAILING TO FOLLOW REASONABLE PROCEDURES TO ASSURE MAXIMUM POSSIBLE ACCURACY AS REQUIRED BY 15 U.S.C. §1681 e(b) AND 15 U.S.C. §1681 (b) BY REPORTING STALE AND MISLEADING INFORMATION CONCERNING PLAINTIFFS BY REPORTING TO THE BUSINESS COMMUNITY A BALANCE OWED WHEN, IN FACT, THE BALANCE HAS BEEN FULLY PAID?
- III. WHETHER OR NOT CONSUMER REPORTING AGENCIES ARE MANDATED TO ADVISE CONSUMERS THEIR RIGHT TO REQUEST UPDATES TO ALL BUSINESSES WHO RECEIVED DISPUTED INFORMATION WHERE THE INFORMATION IS INCOMPLETE AND INACCURATE?

ARGUMENT

- I. WHETHER OR NOT THE DEFENDANTS ARE "CONSUMER REPORTING AGENCIES" WITHIN MEANING OF THE FAIR CREDIT REPORTING ACT, 15 U.S.C. §1680 et seq., WHERE THE UNCONTRADICTED EVIDENCE ESTABLISHES THAT ONE OF THE DEFENDANTS ACTS AS A CONSUMER REPORTING AGENT, THE SECOND, A DEPARTMENT STORE, ACTS IN A COOPERATIVE EXCHANGE OF INFORMATION WITH THE CONSUMER REPORTING AGENCY, AND THE THIRD ACTS AS AGENT OF THE DEPARTMENT STORE IN THIS COOPERATIVE EXCHANGE OF INFORMATION?

The first issue which this Court must answer is whether or not the Defendants, individually, jointly, or severally, are "consumer reporting agencies" as defined by the Fair Credit Reporting Act, 15 U.S.C. §1680 et seq.

The definition of "consumer reporting agency" is defined at 15 U.S.C. §1681 a(f):

"The term 'consumer reporting agency' means any person (person= corporation, 15 U.S.C. §1681 a[b]) which...on a cooperative basis regularly engages...in part in the practice of assembling... consumer credit information or other information on consumers for the purpose of furnishing

consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

"Consumer report" is defined in the Fair Credit Reporting Act, 15 U.S.C. § 1681 a(d) as follows:

"The term 'consumer report' means any written, oral or other communication of any information... bearing on a consumer's credit worthiness, credit standing, credit capacity...."

Against these statutory definitions, the facts of the instant case must be examined.

1. Associated Credit Bureau Services, Inc. admitted in the pleadings that it is a "consumer reporting agency". At paragraph 7 of its Answer To Plaintiffs' Complaint, the Defendant, Associated admitted that it is a "consumer reporting agency". Furthermore, at paragraph 8 of its Answer, the Defendant, Associated admitted that it issued consumer reports concerning the

Plaintiffs. On this stage of the record, the Defendant, Associated is admittedly a consumer reporting agency which issued consumer reports concerning the Plaintiffs.

2. The Defendant, Hess's suggested in its Answer, and the evidence establishes that Hess's acted as a consumer reporting agency in the case at bar. In its Answer filed with the Court, the Defendant, Hess's did not allege that it was not a consumer reporting agency. On the contrary, the Defendant, Hess's suggested to the Court that it complied with the Fair Credit Reporting Act as required by the statute. (See, Fourth and ninth defenses). It is only in Defendant, Hess's Motion For Summary Judgment and Brief in Support thereof that it first argued that it is not a consumer reporting agency.

In order to establish that the Defendant, Hess's is a "consumer reporting

agency", Plaintiffs must produce evidence which meets the elements of the statutory definition as follows:

"Hess's is a corporation which... on a cooperative basis (with Associated Credit Bureau Services, Inc.) regularly engages... in part in the practice of assembling... consumer credit information on consumers (and the Plaintiffs) for the purpose of furnishing consumer reports to third parties, (including Associated Credit Bureau Services, Inc.) and which uses any means or facility of interstate commerce (such as, telephones and U.S. mails) for the purpose of preparing or furnishing consumer reports."

It is respectfully submitted that the evidence fits the Defendant, Hess's into this statutory category on the facts of the instant case.

The Defendants, Hess's and Associated, cited a combined total of three cases on the question of who is a "credit reporting agency". The holding of those cases must be carefully examined by the Court:

Porter v. Talbot Perkins Children Services, 355 F. Supp. 174 (S.D., N.Y., 1973): held that adoption agencies are not consumer reporting agencies against whom prospective adoptive parents have a claim under the Fair Credit Reporting Act because their application for adoption was rejected;

Bellshaw v. Credit Bureau of Prescott et al, 392 F. Supp. 1356 (D.Org., 1975): held that a law firm is not

a consumer reporting agency; and Peller v. Retail Credit Corp., et al 359 F. Supp. 1235 (N.D., Ga., 1973) affirmed without opinion 505 F.2d 733 (5th Cir, 1974): held that an employer who requests a polygraph test and a firm that administers it is not a consumer reporting agency.

Plaintiffs have no serious objection to the

holding in the aforementioned three cases. Plaintiffs do, however, vigorously object to the attempt to stretch the dicta of those three cases to immunize the Defendants, Hess's and General.

As indicated in the legislative history of the Fair Credit Reporting Act, 1970 U.S. Cong. Quar. and Adm. News, Pub. L. 91-508, p. 4414, the exception was intended to be limited to banks who relay consumer reports information solely because of a specific request by a business investigating a consumer for credit:

"The House conferees also intend that the definition of 'consumer reporting agency' not include financial institutions whose lending officers merely relate information about an individual with whom they have had direct financial transactions."

As indicated in Beresh v. Retail Credit Co., Inc., et al, 358 F. Supp. 260 (C.D., Cal., 1973), a life insurance company becomes a consumer reporting agency when it acts in concert with a credit bureau disseminating

information which bears on the consumers' credit worthiness. Again, in Hansen v. Morgan, et al, 405 F. Supp. 1318 (D. Idaho, 1976), retail merchants who are members of a credit reporting bureau and use the services of such bureaus become a credit reporting agency within meaning of the Fair Credit Reporting Act.

The test for deciding whether or not a business is a credit reporting agency was succinctly stated by the Court in Greenway v. Information Dynamics, Inc. 399 F. Supp. 1092, affirmed 524 F.2d 1145 (5th Cir, 1975), cert denied 424 U.S. 969 (1975):

"When an agency disseminates information bearing on any of the seven characteristics of a consumer listed in §1681 a(d) to a third party, and the agency knows and expects that it will be used 'in connection with a business transaction involving the consumer', then that information is a 'consumer report' and its originator is a 'con-

sumer reporting agency'."

399 F. Supp. at 1095

Defendant, Hess's points out that "...when a firm gives its own credit experience on a consumer to a credit bureau, that information does not constitute a consumer report..." according to the F.T.C. 'compliance pamphlet.'¹ Assuming the correctness of that view, the evidence in the instant case establishes more than Defendant, Hess's merely unilaterally relating information on individuals with whom it had direct financial transactions. On the contrary, the evidence conclusively establishes a bilateral relationship

¹It is respectfully pointed out that the F.T.C. does not have rule making power under the F.C.R.A. and that its opinions are not binding on the Court. Foer, What Every Lawyer Should Know About Consumer Reports 61 A.B.A.J. 857 (1975).

between Defendants, Hess's and Associated, with a contractual relationship involving detailed exchange of information as the quid pro quo of the contract, and with Defendant, Hess's, being a member--a component part--of Defendant, Associated. Such joint action between Defendants, Hess's and Associated, qualifies Defendant, Hess's as consumer reporting agencies under Beresh v. Retail Credit Co., Inc., supra, and Hansen v. Morgan, supra. Furthermore, as a member of Associated Credit Bureau Services, the Defendant, Hess's became the originator of consumer reports which it knew would be disseminated by Defendant, Associated, to all interested members, and it further knew it would be used in connection with a business transaction involving the Plaintiffs. As such, it meets the test of Greenway v. Information Dynamics, Inc, supra.

In the final analysis, the question which this Court must ask is whether or not the evidence fits Defendant, Hess's into the statutory definition of "consumer reporting agency" under the Fair Credit Reporting Act, 15 U.S.C. §1681 (f). The Plaintiffs request that this Court dissect the definition into its minimum component parts:

1. Is Hess's a corporation?

PROPOSED ANSWER: Yes.

(Admitted in its Answer)

2. Did Hess's act on a cooperative basis with Associated?

PROPOSED ANSWER: Yes.

(The contract defines the cooperative relationship, and the evidence establishes daily cooperation between the two entities.)

3. Did Hess's, in part, assemble consumer credit information on Plaintiffs and other consumers?

PROPOSED ANSWER: Yes.

(The affidavit of Stephen J. Furst, Vice President, admits

the compiles of such information).

4. Did Hess's furnish such consumer reports to third parties?

PROPOSED ANSWER: Yes.

(The contract between the parties and the actual practice indicates that it was communicated to Defendant, Associated, with the knowledge that it would be disseminated to all members of the association.)

5. Did Hess's use telephones and the mails in relaying such information?

PROPOSED ANSWER: Yes.

(Depositions of Rohrbach indicates constant use of the mails and telephones in relaying such information.)

To affirm the opinion given by the lower court would be to emasculate the requirements of the Fair Credit Reporting Act. In essence, Defendant, Hess's argues that it ought to be allowed to act as a consumer reporting agency by becoming a member of the credit bureau, and then be totally absolved from the requirements of the Act,

regardless of how irregular its procedures and regardless of how inaccurate its information. It is respectfully submitted that the legislators envisioned such a ruse when drafting the Act and included "co-operative" exchange of information as meeting the test for being a "consumer reporting agency".

It is respectfully submitted that the Defendant, Hess's is a "consumer reporting agency" under the Fair Credit Reporting Act.

3. The Defendant, General, acted as agent for Defendant, Hess's forming the third arm of the cooperative triangle of Associated - Hess's - General. Defendant, General concedes that it was acting in its capacity as an independent contractor as agent for the Defendant, Hess's. The question before this Court is whether or not this agency relationship is sufficient

to make Defendant, General liable as agent of a consumer reporting agency for failure to report to Defendant, Associated, that the Plaintiffs' delinquent account was paid in full.

In this regard, the case of Wood vs. Holiday Inns, Inc. 508 F.2d 167 (5th Cir, 1975) is significant. The case involved five parties: Gulf Oil Company, Holiday Inns, Inc., Data Bank, franchisee of Holiday Inns, Inc, and the motel clerk. There, the Court held that Gulf Oil Company was not acting as a consumer reporting agency when it revoked and confiscated Wood's credit card by the motel clerk which was being used at a Holiday Inn, Inc., franchise, but further held that Gulf could be liable under the statute inasmuch as Data Bank was a consumer reporting agency who was acting as a consumer reporting agency, and further the

motel clerk became a sub-agent or sub-employee of Gulf for purposes of confiscating the card from which Gulf would ultimately be liable. In reaching this result, the Court specifically indicated that the agency principles were applicable under the statute.

In the case at bar, Defendant, General, voluntarily joined Defendant, Hess's while it was acting as a consumer reporting agency. First, Defendant, Associated sent dunning letters. Then, when that failed, Defendant, General took over. Given this posture, the Defendant, General as agent for Defendant, Hess's became obligated to advise the Defendant, Associated, that it received full payment on Plaintiffs' delinquent account. Its failure to do so makes Defendant, General liable to Plaintiffs as agent for Defendant, Hess's with full knowledge that Defendant, Associated

was carrying the account as delinquent even though Defendant, General, obtained full payment.

II. WHETHER OR NOT THE DEFENDANTS ACTED NEGLIGENTLY AND WILLFULLY IN FAILING TO FOLLOW REASONABLE PROCEDURES TO ASSURE MAXIMUM POSSIBLE ACCURACY AS REQUIRED BY 15 U.S.C. §1681 e(b) AND 15 U.S.C. §1681(b) BY REPORTING STALE AND MISLEADING INFORMATION CONCERNING PLAINTIFFS BY REPORTING TO THE BUSINESS COMMUNITY A BALANCE OWED WHEN, IN FACT, THE BALANCE HAS BEEN FULLY PAID?

1. Liability under the Fair Credit Reporting Act, 15 U.S.C. §§1681 e(b); 1681 i(d); and 1681 (b) is for negligently or intentionally failing to follow reasonable procedures assuring maximum possible accuracy. The standard of care required by consumer reporting agencies under the Fair Credit Reporting Act is as follows:

"Whenever a consumer reporting agency prepares a consumer report, it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."

15 U.S.C. §1681 e(b)

This is in keeping with the stated Congressional purpose of the Act:

"It is the purpose of this subchapter to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of consumer credit... which is fair and equitable to the consumer with regards to the... accuracy....of such information."

15 U.S.C. §1681 (b)

Once the consumer reporting agency realizes that it has erred, it must notify the consumer that he has the right to demand that notification of such an error be made to all parties who previously received the erroneous information in the past six months:

"Following any deletion of information which is found to be inaccurate...the consumer reporting agency, at the request of the consumer, must furnish notification...to any person specifically designated by the consumer who has...within the past six months prior thereto received a consumer report...

The consumer reporting agency shall clearly and conspicuously disclose to the consumer his right to make such a request."

15 U.S.C. §1681 i(d)

In Millstone v. O'Hanlon Reports, Inc. 383 F.Supp. 269 (D.C. Mo., 1974), affirmed 528 F.2d 829 (8th, 1976), the Court held that where the evidence indicates that the consumer reporting agency did "nothing" by way of follow-up to verify the accuracy of its information, such inaction is so reprehensible to justify not only actual but punitive damages under 15 U.S.C. §§1681 n, 1681 o. Contra: Middlebrooks v. Retail Credit Company 416 F. Supp. 1013 (N.D., Ga, 1976); Austin v. Bankamerica Service Corp. 419 F. Supp. 730 (N.D. Ga, 1974); Peller v. Retail Credit Company 505 F.2d 733 (5th Cir, 1974); Roseman v. Retail Credit Co., Inc. 428 F. Supp. 643 (E.D. Pa, 1977).

In the case at bar, the undisputed facts indicate the same type of "inaction" that the Court found so reprehensible as in Millstone v. O'Hanlon Reports, Inc., supra. The Defendant, Associated obtained information that Plaintiffs' account was delinquent and turned over to collection, and then for years, Defendant, Associated did nothing to see if that information remained accurate. Defendant, Associated, admitted that it does not even have any type of operating procedure to follow-up on checking the continued accuracy of the account. This, however, did not stop them from carrying and reporting the account as delinquent.

The Defendant, Hess's obtained all monies owed by Plaintiffs, and were obligated by contract to report this fact to Defendant, Associated. Yet, Defendant, Hess's who was quick enough to report the

account as delinquent, did nothing to tell Defendant, Associated that the account was paid in full. Again, the Defendant, Hess's admitted that it, as a matter of operating policy, does not report back to Defendant, Associated, once it gets paid in full.

Similarly, the Defendant, General obtained the monies---and its commission---and then did nothing to see that Defendant Associated, was advised that the account was now paid in full.

Even after the Defendants were made aware of their errors, no one--not Associated, Hess's or General--advised the Plaintiffs that they had a right to have all persons who received notice of the error in the past six months to receive notice of the correction. It was only because of Plaintiffs' insistence that Defendant, Associated notified Kern's

Furniture alone of the truth.

The case of liability is clear and unequivocal. The statute requires "...reasonable procedures to assure maximum possible accuracy....". The fact is that all Defendants are culpable of total inaction to assure an up-date on Plaintiffs' account. Consequently, Plaintiffs' Motion For Partial Summary Judgment on the issue of liability is proper.

2. The information on the Todds was stale, misleading, and inaccurate. The lower court found as a matter of fact and as a matter of law that the report was accurate. That result can only flow by isolating the report from the reality of the actual trade practice, and the meaning of the words as used in the trade.

Associated reported that the account reached a high balance of \$1,200.00 in October of 1972; that Hess's charged the

debt to profit and loss; and that Hess's placed the account for collection. According to Randall Skeath, credit manager of Kern's Furniture, that meant that the bill remained unpaid on November 14, 1975 even though the reality was that the bill was paid in full in September of 1974. Furthermore, when Skeath learned that the bill was paid, Kern's Furniture reversed itself and gave the Plaintiffs the requested credit. Accordingly, it must be concluded that the information as given by Associated to third parties, including Kern's Furniture, was inaccurate under prevailing trade practices because advising merchants that the amounts turned over to collection and charged to profit and loss means that the bill remains unpaid, and that the merchants lost money on their dealings with the creditors.

2. Under the F.T.C.'s Compliance

Pamphlet, stale or misleading information is inaccurate information. The Fair Credit Reporting Act, 15 U.S.C. §1681 c(a)(4) puts an outside parameter of seven (7) years on all information, no matter how accurate it might otherwise be. The seven (7) year parameter for obsolete information, however, does not mean that stale and misleading information can be reported, without up-dates, so long as it is less than seven (7) years of age. The requirement of re-evaluation and up-dating of stale information is clearly spelled out in the F.T.C.'s Compliance Pamphlet:

"Accuracy

The obligation to assure accuracy applies to all aspects of the handling of consumer information.. The requirement in law that steps be taken to promote accuracy also requires periodic re-evaluation of data to determine whether it has become obsolete or misleading with the passage of time."

4 CCH, Consumer Guide,
Paragraph 11, 306(c)(2)

That is precisely where the Defendants ran afoul of the Act. Follow-up information was part of the contractual arrangement between Hess's and Associated. Obviously, both were aware of the significance of the passage of time on consumer information. A bill that is one day a large debt becomes the next day a plus mark for the consumer where it is paid in full. The data must be re-evaluated--and up-dated--in order to be accurate. Remember, the statute requires more than accuracy. The statutory standard is one of "maximum accuracy". Yet that was not done in the case at bar, and for over a year, a bill that had been paid in full was reported as a debt because no follow-up was done, and the stale information was misleading because of the passage of time.

III. WHETHER OR NOT CONSUMER REPORTING AGENCIES ARE MANDATED TO ADVISE

CONSUMERS THEIR RIGHT TO REQUEST UP-
DATES TO ALL BUSINESSES WHO RE-
CEIVED DISPUTED INFORMATION WHERE
THE INFORMATION IS INCOMPLETE AND
INACCURATE?

The Plaintiffs testified, and the Court found that Associated failed to advise the Plaintiffs of their right to have all businessmen who received the disputed information of an up-date of their file as required by 15 U.S.C. §1681 i (d). Again, the Court noted that accuracy is the touchstone for activating their rights. It is respectfully submitted that, under 15 U.S.C. §1681 i (a) and (d), the statutory right to be advised that all businesses who received previously disputed information can be forwarded an up-date of the file is broader than the reporting merely inaccurate information:

- (a) If the completeness or accuracy of any item of information in his file is disputed by a consumer..., consumer reporting agency

shall...re-investigate and record the current status of that information...

* * * *

- (d) Following...any notation as to disputed information, the consumer reporting agency shall, at the request of the consumer, furnish notification that the item has been deleted, or the statement codification or summary... (heretofore filed be given).. to any person...who has... within six months prior thereto received a consumer report...The consumer reporting agency shall clearly and conspicuously disclose to the consumer his right to make such a request.

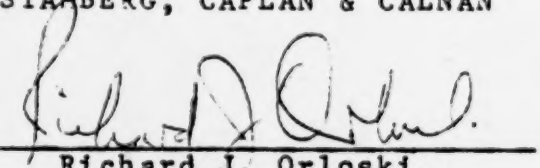
Under terms of the statute, any dispute regarding completeness as well as accuracy is expressly covered by the statute, and the consumer reporting agency must clearly and conspicuously disclose to the consumer his right to request that any business who received the disputed information be given an up-dated version of the account. Inasmuch as the Court found as

a fact that the consumer reporting agency failed to give Plaintiffs this required disclosure of their rights, and inasmuch as the statutory right encompasses completeness as well as accuracy, the Court erred as a matter of law on Plaintiffs' secondary claim under 15 U.S.C. § 1681 i(d) by holding that accuracy was synonymous with completeness, and judgment on the issue of liability must be entered in favor of Plaintiffs.

CONCLUSION

For the foregoing reasons, the Petition For Writ Of Certiorari must be granted.

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 77-2400

EDGAR TODD, JR. and ALICE TODD,

Appellants

vs.

ASSOCIATED CREDIT BUREAU SERVICES, INC.,
GENERAL CREDIT CONTROL, INC., and HESS'S
INC.,

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 76-1456)

Submitted Under Third Circuit Rule 12(6)
June 6, 1978
Before: ALDISERT, ROSENN and HUNTER
Circuit Judges.

JUDGMENT ORDER

After consideration of all contentions
raised by appellants, and for the reasons

EXHIBIT "A"

- 54 -

set forth in the district court opinion by
the Honorable Joseph L. McGlynn, Jr., ____
F.Supp. ____ (E.D. Pa 1977), it is

ADJUDGED AND ORDERED that the judgment
of the District Court be and is hereby
affirmed.

Costs taxed against appellants.

BY THE COURT,

S/Ruggero J. Aldisert
Circuit Judge

Attest:

S/Thomas F. Quinn, Clerk

Dated: June 6, 1978

- 55 -

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR TODD, JR. And :
ALICE TODD, : CIVIL ACTION
: NO. 76-1456
vs. :
: ASSOCIATED CREDIT BUREAU :
SERVICES, INC., GENERAL :
CREDIT CONTROL, INC., and :
HESS'S, INC., :

O R D E R

AND NOW this 9th day of SEPTEMBER,
after a hearing and upon consideration of
the briefs and arguments of counsel, it is
hereby

ORDERED that the defendants' motions
for summary judgment be and the same are
hereby GRANTED.

It is further

ORDERED that the plaintiffs' motion
for partial summary judgment be and the

EXHIBIT "B"

same is hereby DENIED.

It is further

ORDERED that Judgment be entered in
favor of the defendants and against the
plaintiffs.

BY THE COURT:

S/Joseph L. McGlynn, Jr.
J

FILED SEPTEMBER 9, 1977

ENTERED: 7/13/77

CLERK OF COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDGAR TODD, JR. and :
ALICE TODD, :
: CIVIL ACTION
v. : NO. 76-1456
:
ASSOCIATED CREDIT BUREAU;
SERVICES, INC., GENERAL :
CREDIT CONTROL, INC., and
HESS'S, INC. :

MEMORANDUM OF DECISION

Plaintiffs bring this action against the three defendants, Hess's, Inc. [Hess's] General Credit Control, Inc., [General], and Associated Credit Bureau Services, Inc., [Associated], alleging that each committed violations of the Fair Credit Reporting Act.¹ No material facts are controverted and all parties have filed motions for summary judgment. After a thorough examination of the arguments for both sides, I must conclude that the defendants

¹ 15 U.S.C. §1681 et seq.

have not violated the Act. Therefore, I shall grant summary judgment in favor of all defendants. The facts follow.

In October, 1972, the plaintiffs' account with Hess' reached a high balance in excess of \$1,200.00. Collection letters sent at Hess' request by Associated produced no results and Hess' charged off the amount to profit and loss. Thereafter, Hess' turned over the account to General for collection. General accomplished this task by arranging for the plaintiffs to make periodic payments against the balance, and by September, 1974, the Todds had extinguished their debt to Hess'. As late as November, 1975, however, the Todds' credit report showed that, as of the early part of 1973, the plaintiffs owed Hess' \$1,200.00. The report contained no mention that the Todds eventually had paid off their debt.

The plaintiffs' primary claim for relief alleges that the misleading, stale, and erroneous credit report distributed to various retailers by Associated rose to the level of negligent noncompliance with the Act, 15 U.S.C. §1681o. As their secondary claim for relief, plaintiffs allege that Associated violated the Act by failing to inform them of their right, under 15 U.S.C. §1681i(d), to request Associated to notify any person who had received a consumer report within the last six months that the consumer report contained inaccurate information.

The purpose of the Fair Credit Reporting Act is

...to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to

the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this subchapter.

15 U.S.C. §1681(b). If plaintiffs are to prevail in this action, they must prove initially that the defendants are consumer reporting agencies as defined in the Act. Porter v. Talbot Perkins Children's Services 355 F.Supp. 174, 176 (S.D.N.Y.1973).

I believe that neither Hess' nor General falls within this definition. As explained by the Court in Porter,

[e]ssentially, this definition contains four links. (1) The consumer reporting agency must act for monetary fees, dues, or on a cooperative non-profit basis; (2) it must regularly engage in whole or in part in gathering or evaluating information on consumers; (3) the purpose of such activity must be the distribution of information to third parties engaged in commerce; and (4) the agency must use a facility of interstate commerce to prepare or distribute the reports.

355 F.Supp. at 176-7. None of the four

elements of the definition exist in this case. Hess' is a retail department store; General is a collection agency for overdue and delinquent accounts payable. Looking at their activities in the light most favorable to the plaintiffs, Hess' and General disclose either to each other or to Associated only their personal experiences in dealing with the Todds. In Porter, the Court relied upon Federal Trade Commission guidelines which, in interpreting the phrase "consumer credit agencies" stated:

...giving out a firm's own ledger experience does not make it a consumer reporting agency or the information a consumer report. In order to be a consumer reporting agency, the firm must engage "in whole or in part" in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. When a firm gives its own credit experience on a consumer to a credit bureau, that information does not constitute a

consumer report.

355 F.Supp. at 177. See 15 U.S.C. §1681a (d) (A). Because neither Hess' nor General can be considered a consumer reporting agency as defined in the Act, I shall grant summary judgment in their favor.

Associated, as compared with the above two defendants, admits that it acts as a credit reporting agency within the meaning of the Act. As such, its statutory obligation is to "...follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. §1681e(b). The Court, however, does not need to reach the issue of reasonableness if it finds initially that the report furnished was accurate. Middlebrooks v. Retail Credit Co. 416 F.Supp. 1013, 1015 (N.D. Ga. 1976). See Roseman v. Retail

Credit Co., Inc. 428 F.Supp. 643 (E.D. Pa. 1977). In Middlebrooks, the credit report revealed that plaintiff had been arrested in connection with a gambling raid. Plaintiff did not question the accuracy of the credit report statement concerning his arrest; instead, plaintiff disputed only the place of arrest and argued that the credit report should have contained some mention that there was no ultimate disposition of the criminal charge against Plaintiff. The Court, following Peller v. Retail Credit Co. Civil No. 17900 (N.D. Ga., filed Dec. 5, 1973), aff'd mem., 505 F.2 733 (5th Cir. 1974), rejected plaintiff's argument and held that, "...in order to pursue a cause of action predicated upon willful or negligent violation of 15 U.S.C. §1681e(b), the report sought to be attacked must be accurate." (citations omitted)." 416 F.Supp. at 1015.

In the present case, the Todds do not dispute; that their account reached a high balance of \$1,200.00 in October, 1972; that Hess' charged the debt to profit and loss; and that Hess' placed the account for collection with General. These facts are unquestionably accurate and are extremely important to merchants and retailers in deciding whether or not to extend credit to persons such as the plaintiff. Because the report is not inaccurate, I must conclude, in accordance with Middlebrooks, that the Todds can not sustain their cause of action.

Plaintiffs also complain that Associated violated the act by disclosing stale and obsolete information. The plaintiffs' position is unfounded, however, because the Act proscribes the disclosure of information such as that involved here only where the information antedates the

report by more than seven years. 15 U.S.C. §1681c(a) (4). The facts of the case establish that fewer than four years had elapsed from the time that the Todds' account reached the \$1,200.00 balance to the time that plaintiffs filed their complaint. Therefore, I find that Associated did not report obsolete information in violation of the Act.

Upon the finding that Associated reported accurate information, the Todds' secondary claim for relief under 15 U.S.C. §1681i (d) must also fall. That section requires the consumer reporting agency to disclose to the consumer his right to request the consumer reporting agency to notify certain designated persons of the deletion from the report of information found to be inaccurate. Once again, I must state that the Todds' consumer

report contained no inaccurate information. Therefore, no deletions were necessary and no deletions were made. Moreover, the Act imposes no affirmative duty on the consumer reporting agency to inform the consumer of such procedure. Middlebrooks, at 1018; Roseman, at 646. For the above reasons, I conclude that the Todds have failed to prove that Associated violated the Act.

Accordingly, I shall grant each defendant's Motion for summary judgment and I shall deny the plaintiffs' motion for partial summary judgment.